Date 9 September 03
By [illegible]

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA	)	
	)	
v.	)	CRIMINAL No. 102888
	)	
LEE BOYD MALVO	)	

RESPONSE TO MOTION TO SEAL MENTAL HEALTH REPORTS FROM COMMONWEALTH REVIEW PRIOR TO ANY CONVICTION OF A CAPITAL OFFENSE

The Commonwealth asks the court to deny the motion. Many years ago, Virginia adopted a statutory procedure for dealing with expert assistance when the defendant's mental condition is relevant to capital sentencing. § 19.2-264.3:1 of the Code of Virginia spells out in detail how an expert is appointed, what report is required, the nature of the notice required, and the procedure for an examination on behalf of the Commonwealth and its reporting requirements. §19.2-264.3:3 describes the limitations on the use of evidence derived from the examinations. The defendant's motion, while giving lip service to the statute virtually ignores its commands and its clear legislative blueprint.

Not a single case cited in the motion deals with a statute even remotely similar to Virginia. Some of the cases cited, for example State v. Reid, 981 SW 2d 166 (Tenn.1998), involve a state with no statute (or rule either, for that matter). The result is judicial legislation at its finest. Others deal with either the interpretation of court rules or the adoption of court formulated rules. See State v. Johnson, 576 SE 2d 831(Ga. 2003). Since it is axiomatic that court rules cannot overturn a state statute on the same subject, the question becomes whether the Virginia statute is constitutional.

The 4th Circuit Virginia case of Savino v. Murray, 82 F 3d 593 (1996) makes it quite clear that the statutory scheme in this Commonwealth passes constitutional muster on both 5th amendment and 6th amendment grounds. As the court pointed out at page 604:

> "When a defendant asserts a mental status defense and introduces psychiatric testimony in support of that defense, he may face rebuttal evidence from the prosecution taken from his own examination or he may be required to submit to an evaluation conducted by the prosecution's own expert. *Buchanan v. Kentucky*, 483 U.S. 402, 422-23, 107 S.Ct. 2906, 2917-18, 97 L.Ed.2d 336 (1987); *Smith*, 451 U.S. at 465, 101 S.Ct. at 1874. That defendant has no Fifth Amendment protection against the introduction of mental health evidence in rebuttal to the defense's psychiatric evidence. *Powell v. Texas*, 492 U.S. 680, 684-85, 109 S.Ct. 3146, 3149-50, 106 L.Ed.2d 551 (1989); *Buchanan*, 483 U.S. at 422-23, 107 S.Ct. at 2917-18. In essence, the defendant waives his right to remain silent-but not his right to notice-by indicating that he intends to introduce psychiatric testimony. *Powell*, 492 U.S. at 685, 109 S.Ct. at 3150."

In sustaining its constitutional validity the court goes on to point out:

> In Virginia, the statutory scheme set forth in Va. Code Ann. § 19.2-264.3:1 governs the use of psychiatric testimony in a capital case. The provisions operate to notify the defense that its decision to introduce psychiatric testimony constitutes a waiver of the defendant's right to remain silent during examination by the Commonwealth's mental health examiner. The statute treats the defendant's waiver as a condition precedent to the prosecution's use of psychiatric evidence. See *Washington v. Murray*, 952 F.2d 1472, 1480 (4th Cir.1991) (construing Virginia statute). It details the conditions under which the Commonwealth is entitled to have an examiner evaluate the defendant and outlines the scope and permissible uses of that examination. Va. Code Ann. § 19.2-264.3:1(F) & (G)."

A reading of the case makes it clear that the Virginia statute protects the constitutional rights of the criminal defendant. Faced with this, the defense motion in paragraph 10, asks the court to ignore the plain language of the statute and prohibit the Commonwealth from any access to either its own expert's report or the defense expert's report until after the guilt phase of trial. Presumably the defense could spend months preparing its mitigation defense and securing its witnesses for trial, and the Commonwealth would have to wait until some morning in Chesapeake after guilt is established to learn what the mitigation claim is. Only then could the Commonwealth send out subpoenas for rebuttal witnesses. (So much for "level playing fields".)

Unfortunately for the defense the law is to the contrary. In the Federal case of U.S. v. Hall, 152 F.3d 381 (5th Cir 1998) a question similar to ours was answered by the 5th Circuit of the United States. At page 399 the Court said:

> "The only specific safeguard that Hall requested in his motion opposing the government's request for a psychiatric examination and oral argument on this motion was the sealing of the results of the examination until the penalty phase of his trial. Hall has cited several cases in which district courts have imposed such a safeguard. See *United States v. Beckford*, 962 F. Supp. 748 761 (E.D.Va.1997); *United States v. Haworth*, 942 F.Supp. 1406, 1408-09 (D.N.M.1996); *United States v. Vest*, 905 F. Supp. 651, 654 (W.D. Mo.1995). While we acknowledge that such a rule is doubtless beneficial to defendants and that it likely advances interests of judicial economy by avoiding litigation over whether particular pieces of evidence that the government seeks to admit prior to the defendant's offering psychiatric evidence were derived from the government psychiatric examination, we nonetheless conclude that such a rule is not constitutionally mandated." (emphasis added)

The Court compared the situation to Rule 12.2(c) of the Federal Rules of Criminal Procedure and went on to say:

> "Noticeably absent from the rule is any requirement that the government be denied access to the results of the examination until after the defendant actually introduces testimony regarding mental condition. Rather, the rule merely precludes the government from introducing as evidence the results of the examination or their fruits until after the defendant actually places his sanity in issue. Yet the rule has consistently been held to comport with the Fifth Amendment. See, e.g., *United States v. Lewis*, 53 F.3d 29, 35 n. 9 (4th Cir.1995); *United States v. Stockwell*, 743 F.2d 123, 127 (2d Cir.1984)".

§ 19.2-264.3: offers more, not less than the protection of the Federal Rule. That section makes it clear that any disclosure or statements in the evaluation can only be used in rebuttal. The language of the Hall court is particularly relevant at page 400:

> "Given that the government presents its case-in-chief during the guilt phase prior to the defendant, we perceive no functional distinction between the risk that the government will improperly utilize the fruits of a psychiatric examination undertaken pursuant to Rule 12.2 during its case-in-chief (and thus prior to the defendant's offering psychiatric evidence of insanity) and the risk that the government in this case would improperly utilize the fruits of the court-ordered psychiatric examination prior to Hall's introduction of psychiatric evidence during the penalty phase. We therefore reject Hall's contention that the

district court violated his Fifth Amendment privilege against self-incrimination by ordering him to undergo a psychiatric examination as a condition upon his offering psychiatric evidence during the sentencing hearing or by declining to order the results of the examination sealed until the sentencing hearing."

The question here is not judicial economy; it is constitutional validity. The Virginia procedure certainly passes constitutional muster and it should be followed.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to Defendant's Motion was mailed, postage prepaid, and faxed to Michael Arif, Counsel for Defendant, 8001 Braddock Road, # 105, Springfield, Virginia 22151 and Craig Cooley, Counsel for the Defendant, 3000 Idlewood Avenue, P.O. Box 7268, Richmond, Virginia 23221 this 9th day of September, 2003.

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